UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MONSTER TECHNOLOGY GROUP, LLC **3708 Las Vegas Boulevard** **Suite 2102W** **Las Vegas, Nevada 89109** **Plaintiff,** **v.** **GARRETT A. ELLER, JUDGE** **TRIBAL COURT** **IOWA TRIBE OF OKLAHOMA** **335588 East 750 Road** **Perkins, Oklahoma 74059** **Defendant.**	)	**Case No. 21-cv-00879-J**

BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

I. FACTUAL BACKGROUND

The Verified Complaint for Declaratory and Injunctive Relief (Verified Complaint) sets forth the factual and legal premises warranting entry of injunctive relief against any continued exercise of jurisdiction on the part of the Tribal Courts of the Iowa Tribe of Oklahoma as to claims brought by the Iowa Tribe itself against a non–Indian corporation whose predecessor in interest – also a non–Indian entity – simply contracted to render services nowhere near Tribal lands in connection with operations to take place outside the United States. The legal premises begin with the jurisdiction of this Court to entertain the lawsuit. *Id.*, ¶ 2 ("This Court has jurisdiction pursuant to 28 U.S.C. § 1331, in that

whether a Tribal Court has the power to entertain claims against a non-Indian presents a federal question. *National Farmer's Union Insurance Co. v. Crow Tribe*, 471 U.S. 945, 852 (1985).")

Plaintiff has "name[d] Defendant Eller in his official capacity [as a judge of the Iowa Tribal Courts], for purposes of securing declaratory relief, as well as prospective injunctive relief against any continued exercise of jurisdiction of claims against Plaintiff in the Iowa Tribal Courts, pursuant to the authority of *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny." *Id.*, ¶ 8.

The Supreme Court in *Ex Parte Young* carved out an exception to State sovereign immunity pursuant to Eleventh Amendment of the United States Constitution, holding that a state official could be sued for prospective injunctive relief against continuing unlawful conduct deriving from the fiction that the claim for relief did not run directly against the State.

The Tenth Circuit in *Crowe Dunlevy. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), applied *Ex Parte Young* in upholding a preliminary injunction entered to restrain a tribal court from exercising jurisdiction over non–Indian attorneys – who were members of the bar of the court – directed to disgorge attorney fees pending judicial determination as to the propriety of payment. *Id.* at 1154–55.

The Verified Complaint sets forth the chain of events eventually leading Plaintiff to seek arbitration of claims against the Iowa Tribe of Oklahoma:

B. ONLINE INDIAN GAMING DIRECTED TO AN EXCLUSIVELY INTERNATIONAL MARKET

1. FACTUAL BACKGROUND

13. UEG formerly partnered with the Cheyenne and Arapaho Tribes of Oklahoma ("CNA") in an extraordinarily complex effort to develop software and related technical aids – together with the legal framework – necessary for creating a website devoted to online Indian gaming, in compliance with existing State and federal law. The CNA called the project *pokertribes.com* ("*Pokertribes*").

14. The CNA eventually invested significant funds in *Pokertribes*. However, the investment was dwarfed by reported development costs incurred by UEG; and was modest as against economic projections for a successful venture: A study of the world-wide online gaming market concluded that *Pokertribes* could bring $132 million in gross annual revenue to the CNA by the year 2018, assuming its website was attracting just 2% of the market worldwide.

15. However, *Pokertribes* became a controversial subject during a CNA Tribal election season and the sitting Governor lost her position. Her opponent had supported *Pokertribes,* until a law firm seeking to represent the CNA lied to Tribal officials about the legitimacy of the project and its implications for existing Tribal operations.

2. IOWA TRIBE PICKS UP THE *POKERTRIBES* EFFORT

16. In September 2015, the Iowa Tribe entered a "Software Licensing Agreement" ("Licensing Agreement") with the CNA's former partner UEG relating to assets including "software, translations, and modifications, support materials and documents ...", *id.*, § 1.2, all plainly necessary for any viable project to bring online Indian gaming to an international market.

17. A "Delivery and Acceptance Testing" section of the Licensing Agreement affirmed in part that "[t]he Licensed Software has been tested by Licensee to determine that the program performs according to Licensor's general descriptions of its capabilities." *Id.*, § 3.2.

18. A "Termination" section of the Licensing Agreement said in part that

"Licensee may terminate this Agreement by intentionally destroying the Licensed Software and documentation and all copies thereof, or by returning the same to Licensor." *Id.*, 7.1.

19. The Tribe agreed to a "License Issue Fee" of $500,000, *id.*, § 4.1; and to "Sales–based Royalties" of "Twenty-Nine Percent (29%) of the net revenues received by the Licensee in the business operation ...." *Id.,* § 4.2.

20. Armed with software, legal and technical aids, numerous trade secrets and other assets under license from UEG, all demonstrating that online Indian gaming was indeed a viable enterprise, the Tribe sought arbitration before the AAA of a "dispute" between the Tribe and the State of Oklahoma (which actually supported the Tribe's efforts) as to the legality of an Oklahoma Tribe conducting online gaming directed to an exclusively international market.

21. The Tribe prevailed in arbitration. In April 2016, the U.S. District Court for the Western District of Oklahoma ("Western District") confirmed the arbitration award, thereby freeing the Iowa Tribe to continue the effort towards offering online gaming directed to an exclusively international market.

B. CREATION OF A TRIBAL ENTITY DESIGNED TO REAP ALL THE BENEFITS OF ONLINE GAMING; PURCHASE OF ASSETS LICENSED FROM UEG; SUBSEQUENT RECOUPMENT OF CASH OUTLAY AND OTHER CONSIDERATION FOR THE PURCHASE; AND REPUDIATION OF ANY OBLIGATION TO SHARE IN REVENUES

1. CREATION OF TRIBAL ENTITY DESIGNED TO REAP ALL THE BENEFITS OF ONLINE GAMING

22. In January 2016, while litigation to confirm the arbitration award was still underway in the Western District, the Tribe incorporated the "Ioway Internet Gaming Enterprise Limited" pursuant to Tribal law; and enacted the Iowa Tribe of Oklahoma Ioway Gaming Enterprise Act ("Ioway Gaming Enterprise Act" or "Act") through a Resolution of the Tribe's Business Committee adopted January 27, 2016.

23. Section 8 of the Act, "Ownership and Revenues", provided in part as follows:

(a) *Ownership.* The Enterprise and all personal property assets used in the operation of the Enterprise and **the revenues generated by the Enterprise shall be and continue to be owned by the Tribe** but shall be administered for the Tribe by the Enterprise for the benefit of the Tribe .... (emphasis added).

2. PURCHASE OF ASSETS LICENSED FROM UEG, AND MISLEADING ASSURANCE OF A CENTRAL ROLE, AND RIGHTS IN, ANY ONLINE GAMING OPERATION

24. In or about November 2016 the Tribe entered an "Intellectual Property and Other Assets Purchase Agreement" ("November 2016 Agreement") with UEG relating to "Online Gaming Assets" and "Online Gaming Intellectual Property", including "any and all copyright, trademarks, and patents either owned by or applied for on behalf of UEG." *Id.*, ¶ 1.b. (Exhibit 1 hereto). The November 2016 Agreement called for the Tribe to make payments over time totaling $10 million to UEG, including an immediate payment of $1,650,000, in exchange for 51% of the "Online Gaming Assets." *Id.*, ¶ 2. It also provided for arbitration under the rules of the American Arbitration Association of **"[a]ny dispute or difference arising out of or in connection with this Agreement ...**." *Id.* § 8.e. (emphasis added).

25. The parties' agreement to application of the rules of the American Arbitration Association meant the AAA would have authority to decide whether a dispute arising from the Agreement of November 2016 was subject to arbitration. *Nitro-Lift Technologies, LLC v Howard.*, 568 U.S. 17, 133 S.Ct. 500, 503, 184 L.Ed. 2d 328 (2012) "[W]hen parties commit to arbitrate contractual disputes, it is a mainstay of the [Federal Arbitration] Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.'...." (citations omitted))

26. The Tribe made payments to UEG totaling $1,950,000, and agreed to pay the balance of the purchase price from eventual revenues of the gaming operation. This purported commitment was plainly at odds with the Ioway Gaming Enterprise Act's provision that "revenues generated by the Enterprise shall be and continue to be owned by the Tribe ...." *Id.*, § 8.

27. Subsequent events also make clear that the Tribe never intended to honor commitments made to UEG in the Agreement of November 2016.

28. In December 2016, the Tribe organized Iowa Tribe Online Gaming Software LLC under the laws of Oklahoma ("Oklahoma LLC") , designating the Tribe and UEG its sole members.

29. In January 2017, the Tribe and UEG transferred to the Oklahoma LLC their respective interests in any "Online Gaming Assets" – defined by the Intellectual Property and Other Assets Purchase Agreement of November 2016 – while agreeing that the LLC would be entitled to recover the balance of the $10 Million purchase price from any eventual revenues, together with royalties in the amount of 49% of eventual revenue.

30. However, the Tribe never intended for the Oklahoma LLC to recover the balance of the purchase price, or royalties from any eventual gaming revenue: At the end of the initial registration period, the Tribe allowed the Oklahoma LLC to become "inactive" and essentially defunct.

31. In February 2017, the Tribe also made application for a gaming license in Isle of Man on behalf of the Ioway Internet Gaming Enterprise Limited, the wholly owned corporation organized under Tribal law in January 2016, whose revenues were to be "owned by the Tribe ...." Ioway Gaming Enterprise Act, § 8(a)(2).

3. RECOUPMENT OF CASH OUTLAY AND OTHER CONSIDERATION GIVEN FOR TRIBE'S PURCHASE OF UEG ASSETS

32. In September 2017, the Tribe, UEG and the Oklahoma LLC signed onto an "Intellectual Property and Other Assets Purchase Agreement" ("September 2017 Agreement") providing in part that the Tribe convey to UEG the 51% interest in "Online Gaming Assets" the Tribe had acquired from UEG in November 2016. *Id.* at 1.
33. The transfer meant the sole member of the LLC would be UEG. *Ibid*. As for purchase price, the agreement called for UEG to repay to **the Tribe** $1,650,000, the amount UEG received from the Tribe under the November 2016 Agreement.

33. The transfer meant the sole member of the LLC would be UEG. *Ibid*. As for purchase price, the agreement called for UEG to repay to **the Tribe** $1,650,000, the amount UEG received from the Tribe under the November 2016 Agreement.

34. On the same day, and as additional consideration for UEG's payment of $1,650,000 to the Tribe and agreement to recover the balance of the purchase price from eventual gaming revenues, the Tribe also agreed that UEG would be also entitled to an increase in the percentage of any net gaming revenue from 29% to 49%.

35. The September 2017 Agreement also purported to supersede and replace the Agreement of November 2016 between the Tribe and UEG, and purported to void any assignment of rights under the Agreement of November 2016.

36. However, several weeks earlier, UEG **transferred** its 49% interest in any "Online Gaming Assets" to Monster. Monster was not party to the subsequent Agreement of September 2017: Monster's claims deriving from UEG's rights under the Agreement of November 2016, including the right to arbitration of any dispute, thus survived notwithstanding the Agreement of September 2017 between the Tribe and UEG.

4. REPUDIATION OF ANY OBLIGATION TO SHARE IN REVENUES DERIVED FROM ONLINE GAMING OPERATIONS MADE POSSIBLE BY UEG

37. Some time after September 2017, the Iowa Tribe obtained the requisite licensure for its wholly owned corporation Ioway Internet Gaming Enterprise Limited to begin conducting online gaming operations directed to an international market from the Isle of Man.

38. The Tribe then repudiated any obligation to share in revenue software, technical aids and other assets created by UEG were somehow inadequate to the purpose, and that the Tribe was therefore compelled to acquire the requisite software and technical aids from another developer.

> 39. Yet the Tribe signed on to a Licensing Agreement in September 2015 affirming in part that "[t]he Licensed Software has been tested by Licensee to determine that the program performs according to Licensor's general descriptions of its capabilities." *Id.*, § 3.2.
>
> 40. Moreover, the Tribe never invoked the "Termination" section of the Licensing Agreement providing that "Licensee may terminate this Agreement by intentionally destroying the Licensed Software and documentation and all copies thereof, or by returning the same to Licensor." *Id.*, 7.1.
>
> 41. The Tribe thus never intended to adhere to the Agreement of November 2016; but rather, planned (a) to secure the return of the $1,650,000 paid thereunder; (b) to allege the software, technical aids and other assets acquired from UEG were somehow defective; and finally, © to repudiate commitments to pay the balance of the purchase price from online gaming operations, and 49% of any net revenues derived from the same operations going forward.

Ibid.

Plaintiff went on to claim that the foregoing gives rise to a claim for breach of the duty of good faith and fair dealing with respect to the Agreement of November 2016 between the Tribe and UEG, for which the Tribe is liable in contract damages. *Id.*, ¶ 42.

The Verified Complaint also sets forth undisputed legal principles that plainly required the Iowa Tribal Courts to refrain from exercising jurisdiction of claims against a non–Indian corporation, successor in interest to another non–Indian entity which contracted with the Tribe to render services far from Tribal lands, in connection with gaming operations to be conducted outside the United States:

A. TRIBAL COURTS HAVE LIMITED JURISDICTION TO ENTERTAIN CLAIMS AGAINST NON–INDIANS

9. Indian Tribes are "distinct, dependent political communities, qualified to exercise many of the powers and prerogatives of self–government." *Plains Commerce Bank v. Long Family Land & Cattle Co.* 554 U.S. 316, 327 (2008). However, Tribal "sovereignty ... is of a unique and limited character, ... center[ing] on the land held by the tribe and tribal members within a reservation." *Id.*

10. Thus the "exercise of tribal power beyond what is necessary to protect tribal self–government or to control internal relations is inconsistent with the dependent status of tribes, and ... cannot survive without express congressional delegation." *Montana v.United States*, 450 U.S. 544, 564 (1981). "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. *See also, Plains Commerce Bank, supra*, 544 U.S. at 330 ("efforts by a tribe to regulate nonmembers, especially on non–Indian fee land, are presumptively invalid.").

11. The "*Montana* rule" is subject to two narrow exceptions: First, a "tribe may regulate, through taxation, licensing, or other means, the activities of non–members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements...." (citations omitted). *Montana*, *supra*, 450 U.S. at 565. However, as the Supreme Court later made clear, "even then, the regulation must stem from the tribe's inherent authority to set conditions on entry, preserve tribal self–government, or control internal relations." *Plains Commerce Bank, supra*, 544 U.S. at 337. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe...." (citations omitted). *Montana*, *supra,* 450 U.S. at 565.

12. Moreover, a litigant challenging a Tribal court's exercise of jurisdiction in federal court need not exhaust remedies before the Tribal court in circumstances plainly present here, including "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; "where the tribal court action is patently violative of express jurisdictional prohibitions"; and "when it is clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay." *Burrell v. Armijo*, 456 F.3d 1059, 1068

(10th Cir. 2006).

Ibid.

II. ARGUMENT

A PRELIMINARY INJUNCTION IS WARRANTED TO RESTRAIN THE COURTS OF THE IOWA TRIBE FROM EXERCISING JURISDICTION OF A NON–INDIAN CORPORATION AS TO SERVICES RENDERED FAR FROM TRIBAL LANDS, WITH RESPECT TO OPERATIONS OUTSIDE THE UNITED STATES

A preliminary injunction is appropriate where (1) the moving party is substantially likely to succeed on the merits; (2) the moving party will suffer irreparable injury if the Court should deny injunctive relief; (3) the threatened injury outweighs any injury to the opposing party if the preliminary injunction is entered; and (4) the injunction would not be adverse to the public interest. *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017).

We respectfully submit that the factual background and legal principles set forth above serve to establish each of the requisite elements warranting preliminary injunctive relief.

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Tribal jurisdiction over nonmember conduct is very limited, even with respect to conduct taking place on non–Tribal lands. Here services rendered to the Tribe took place far from Tribal lands with respect to gaming operations to take place outside the United States.

The Supreme Court in *Montana v. United States* emphasized the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *id.*, *supra* 450 U.S. at 565, a principle it later explained as deriving from the reality that " tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . person[s] within their limits **except themselves**.'" *Plains Commerce Bank*, *supra,* 554 U.S. at 328 (emphasis added) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978)).

The Verified Complaint sets forth the *Montana C*ourt's two narrow exceptions to the general rule, as to which the Tribe seeking to exercise jurisdiction bears the burden of proof:

> * * * First, a "tribe may regulate, through taxation, licensing, or other means, the activities of non–members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements...." (citations omitted). *Montana*, *supra*, 450 U.S. at 565. However, as the Court later made clear, "even then, the regulation must stem from the tribe's inherent authority to set conditions on entry, preserve tribal self–government, or control internal relations." *Plains Commerce Bank, supra*, 544 U.S. at 337. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe...." (citations omitted). *Montana*, *supra,* 450 U.S. at 565.

Id., ¶ 11.

Neither exception applies here. No federal court has ever found that the *Montana* exception for "consensual relationship with a tribe ..., through commercial dealings,

contracts, leases, or other arrangements ..." – again, deriving from "the tribe's inherent authority to set conditions on entry, preserve tribal self–government, or control internal relations" – somehow applies to permit its tribal court to entertain a claim against a non–Indian entity contracting to render services nowhere near Tribal lands.

Indeed, the Tenth Circuit has held that voluntary membership in a tribal court bar, and appearance in a lawsuit before the court, is an inadequate jurisdictional basis for the tribal court to direct that attorney fees be held in escrow pending determination as to the propriety of the fees paid to the non–Indian attorneys. *Crowe Dunlevy v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011).

If voluntary membership in, and practice before a tribal court itself are insufficient attributes of a "consensual relationship" sufficient to establish the first *Montana* exception for purposes of a potential disgorgement of attorney fees, then we submit a contract with a non–Indian entity to render services far from Tribal lands is plainly an insufficient basis for a tribal court to exercise jurisdiction.

As for the second *Montana* exception – authority to exercise jurisdiction with respect to "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe...." – it is plainly inapplicable as well. "[T]he challenged conduct must be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting *Plains Commerce Bank*, 554 U.S. at 341).

B. THE EXHAUSTION DOCTRINE SHOULD NOT APPLY

We submit it is equally clear that Plaintiff should not be held to an exhaustion requirement before the Iowa Tribal Courts. As also set forth in the Verified Complaint:

> 11. [A] litigant challenging a Tribal court's exercise of jurisdiction need not exhaust remedies before the Tribal court in circumstances plainly present here, including "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; "where the tribal court action is patently violative of express jurisdictional prohibitions"; and "when it is clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay." *Burrell v. Armijo*, 456 F.3d 1059, 1068 (10th Cir. 2006).

Ibid.

Any one of the foregoing exceptions is sufficient to avoid the exhaustion doctrine. We submit that each applies here.

The proceedings before the Iowa Tribal Court were hardly conducted in good faith: Defendant Eller granted injunctive relief in short order with no discussion of the fundamental jurisdictional issues, on the basis of an agreement to which Plaintiff was not a party. *Id.*, ¶¶ 45–46. The Iowa Supreme Court lacks the judges necessary to schedule briefing or oral argument. *Id.*, ¶ 47.

As for the additional exceptions to the exhaustion doctrine set forth in *Burrell*, the foregoing treatment of the likelihood of success on the merits should serve to establish that "the tribal court action [is] patently violative of express jurisdictional prohibitions"; and that "it is clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay." *Id.,* 456 F.3d at 1068.

The latter was the ground invoked to reject the exhaustion requirement in *Crowe Dunlevy, supra* at 1153 ("[T]he exhaustion requirement would serve no purpose, and there is no need to require further tribal court litigation before the exercise of federal jurisdiction in this case.")

C. PLAINTIFF WILL SUFFER IRREPARABLE INJURY ABSENT ENTRY OF A PRELIMINARY INJUNCTION

Like the non–Indian attorneys in *Crowe Dunlevy,* absent injunctive relief Plaintiff "will be forced to expend unnecessary time, money, and effort litigating ... [in] a court which likely does not have jurisdiction over it." *Id.*, *supra*, 640 F.3d at 1157 (internal quotation marks omitted). The Tenth Circuit there explained that, "[w]hile "economic loss is usually insufficient to constitute irreparable harm ..., the [i]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury...." (citations omitted). *Ibid.*.

Here Judge Eller and other judicial officers would no doubt assert sovereign immunity as against any eventual claims of wrongdoing deriving from entertaining a claim for injunctive relief against a non–Indian corporation plainly beyond the jurisdiction of the Iowa Tribal Courts.

The harm to Plaintiff also outweighs any inconvenience to the Iowa Tribe in participating in an arbitration proceeding involving a claimed breach the implied covenant of good faith and fair dealing inherent in any contract entered in the State of Oklahoma. *See*

D. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Finally, we submit a preliminary injunction would serve the public interest, in that it is in the interest of the public to restrain trial courts from entertaining claims against nonmembers in the absence of jurisdiction. *See Crowe Dunlevey*, *supra*, 640 F.3d at 1158 ("We are simply not persuaded [that] the exertion of tribal authority over ... a nonconsenting, nonmember, is in the public's interest.").

Indeed, the Supreme Court has explained the inherent inequity in exercising tribal authority with respect to "nonmembers [who] have no part in tribal government—... [and] have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337 (citing *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment)).

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining Defendant Eller and other judicial officers of the Iowa Tribe of Oklahoma, from continuing to exercise jurisdiction of claims against Plaintiff, or otherwise interfering with an arbitration taking place before the American Arbitration Association.

Respectfully submitted this 9th day of September, 2021,

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